St. Mary's Law Journal

Volume 22 | Number 4 Article 9

1-1-1991

In Sharp Contrast to the Past: The Demise of the Per Se Rule against Vertical Price Fixing.

Christopher J. Pettit

In *Sharp* Contrast to the Past: The Demise of the Per Se Rule Against Vertical Price Fixing

Christopher J. Pettit

I. Introduction 1075
II. The Origin of the Per Se Rule Against Vertical Price Fixing 1078
III. Statutory Evolution of Per Se Rule as Applied to Vertical Price Fixing 1083
IV. The Nature of Agreements Which Restrain Trade 1085
V. The Legal Impact of the Per Se Rule: The Academic Debate 1088
VI. The Influence of the Chicago School Upon the Department of Justice 1093
VII. Breaking with the Past: The Influence of the Chicago School on the Supreme Court 1096
VIII. The Price Fixing Prevention Act of 1991 1099
IX. A *Sharp* Solution 1106
X. Conclusion 1109

[A] government that is comparatively inactive but does the wrong things may do much more to cripple the forces of a market economy than one that is more concerned with economic affairs but confines itself to actions which assist the spontaneous forces of the economy.[1]

I. INTRODUCTION

Vertical price fixing involves an agreement between parties at different levels of the product distribution chain to set, maintain, stabilize, raise or depress the price of goods or services within the intrabrand market.[2] Until

1. F. HAYEK, THE CONSTITUTION OF LIBERTY 222 (1960).

2. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-51 (1982) (agreements to fix minimum or maximum price are illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (agreements to fix price are found in any market manipulation which artificially stimulates price). A combination whose effect is the "raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce" is illegal and in violation of the Sherman Act. *See id.* (agreements affecting price are illegal per

recently, courts found price oriented vertical restraints illegal per se.[3] In the Sherman Antitrust Act[4] (the Sherman Act), Congress made clear that an explicit agreement to fix prices at any level, or an agreement which has the ultimate effect of fixing prices at any level, is illegal per se.[5]

After 1911, courts applied the rule of per se illegality to vertical restraints which directly affected price, or interfered with the natural market forces which proximately affected prices.[6] However, in 1983, the Department of

---

se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 291-92 (1975) (maximum vertical price restraints are illegal per se).

3. *See* Nat'l Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (restraints which have anticompetitive impact on price are illegal per se); *see also* Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 19-20 (1979) (restraints which are detrimental to competition are illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (market restraints which affect price are illegal per se); United States v. General Motors Corp., 384 U.S. 127, 147 (1966) (conspiracies to eliminate discount retailers have indirect affect on price and is illegal per se); United States v. Frankfort Distilleries Inc., 324 U.S. 293, 296 (1945) (price fixing is illegal under Sherman Act); United States v. Masonite Corp., 316 U.S. 265, 276 (1941) (fixing prices by one member of group pursuant to express delegation, acquiescence or understanding of others is illegal per se); Fashion Originator's Guild, Inc. v. FTC, 312 U.S. 457, 466 (1941) (vertical price fixing tends to create monopolies and lessen competition and is illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (vertical price fixing is illegal per se); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 62 (1927) (express or tacit agreement on price is illegal); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 399-402 (1911) (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1975) (vertical price restraints are illegal per se).

4. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Antitrust Act provides that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.*

5. *See Maricopa County Medical Soc'y*, 457 U.S. at 342-51 (agreements which affect either minimum or maximum prices are illegal under Sherman Act); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (any agreements which stimulate movement in market prices are illegal per se). Any agreement which has the purpose or effect of "raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce" is a violation of the Sherman Act. *Id.*

6. *See National Soc'y of Professional Engineers*, 435 U.S. at 688 (restraints which have impact on prices are illegal per se); *Broadcast Music, Inc.*, 441 U.S. at 19-20 (per se rule applies to restraints which stifle competition); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (restraints with market impact on price are illegal per se); *General Motors Corp.*, 384 U.S. at 147 (conspiracies which have indirect effect on price are illegal per se); *Frankfort Distilleries Inc.*, 324 U.S. at 296 (price fixing is illegal under Sherman Act even though affecting only local prices); *Masonite Corp.*, 316 U.S. at 276 (agreements which fix prices by express delegation, acquiescence or understanding of others is illegal per se); United States v. Univis Lens Co., 316 U.S. 241, 251 (1942) (fact that item has patent is no excuse for vertical price restraints); *Fashion Originator's Guild of America, Inc.*, 312 U.S. at 466 (vertical

Justice[7] sought to foster an alternative to the per se rule by actively arguing, before the United States Supreme Court, the merits of an antitrust policy founded on a theory originally formulated by the Chicago School of Economics.[8] The Court first responded to the Justice Department's arguments in 1984 by increasing the evidentiary burden on plaintiffs in vertical price fixing litigation.[9] Then in 1989, the Court, in *Business Electronics Corp. v. Sharp Electronics Corp.*,[10] abandoned the per se rule against vertical price fixing by holding that an agreement between a manufacturer and a non-discount retailer to terminate the product supply sold to a discount retailer was not per se illegal under the Sherman Act.[11] While prior caselaw established

---

price fixing is illegal); *Socony-Vacuum Oil Co.*, 310 U.S. at 223 (vertical price fixing is illegal per se); United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1927) (reasonableness of price is no excuse); *Pacific States Paper Trade*, 273 U.S. at 62 (express or tacit agreement on price is illegal); *Dr. Miles Medical Co.*, 220 U.S. at 399-401 (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1975) (vertical price restraints are illegal per se); Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division*, 75 YALE L. J. 373, 397-494 (1966) (agreements which affect price are illegal per se).

7. *See* Brief for the United States as Amicus Curiae in Support of the Petitioner, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) (No. 82-914) (Justice Department is enforcer of antitrust laws). It is clear that it is the responsibility of the Department of Justice to enforce the antitrust laws through the initiation of suits upon the public interest to promote competition in the marketplace. *Id.* at 15-18. "The United States has the primary responsibility for the enforcement of the federal antitrust laws, [and] has a substantial interest in assuring that the Sherman Act is construed in a manner that most effectively advances the Act's objective of protecting the Nation's competitive economic system." *Id.* at 18.

8. *See* Monsanto v. Spray-Rite Corp., 465 U.S. 752, 764 (1984) (plaintiff must prove that agreement exists as well as disprove all possible defenses). The Justice Department espoused a theory of antitrust developed by Judges Robert Bork and Richard Posner, often considered the leaders of the Chicago School. *See* Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, Trade Regulation Reports (CCH) No. 438, at 4 (April 11, 1990). Under the influence of the Chicago School theory, the Court altered the evidentiary burden placed upon plaintiffs in vertical price fixing actions. *Id.* at 2. The Court determined that in order to recover in a vertical price fixing action, the plaintiff need prove that there was an agreement as well as disprove all possible justifications for the vertical restraint imposed by the manufacturer. *Id.*; *see also Monsanto*, 464 U.S. at 764.

9. *See Monsanto*, 464 U.S. at 764. The plaintiff must prove that an agreement exists as well as disprove all possible defenses. *Id.* While the Court chose to alter the plaintiffs evidentiary burden in vertical price fixing suits, the Court explicitly stated that it would not extend its inquiry into the propriety of the per se prohibition of vertical price fixing as requested by the Justice Department. *Id.* at 752 n.7.

10. 485 U.S. 717, 736 (1988) (Court revised per se rule). The Court abandoned the rule that all agreements which affect price are illegal per se and instead fashioned the rule that only agreements which explicitly fix prices are illegal per se. *Id.*

11. 485 U.S. 717, 731-35 (1988) (Court determined that vertical restraints that do not explicitly state price are to be judged under Rule of Reason rather than per se prohibition).

that agreements which explicitly state price, and those which merely affect price, are illegal per se, the *Sharp* decision stated that only agreements which explicitly fix prices are illegal per se.[12] The *Sharp* decision directly contradicts 80 years of precedent which held that agreements which either explicitly set or implicitly affect prices were illegal per se.[13]

II. THE ORIGIN OF THE PER SE RULE AGAINST VERTICAL PRICE FIXING

In the late nineteenth century, Congress first asserted its role as the "ultimate antitrust policymaker."[14] Because of problems created by the Industrial Revolution,[15] Congress perceived the need to create legislation which would temper the anticompetitive trusts that had formed in the wake of rapid economic growth.[16] In a process known as vertical integration, manu-

---

12. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (agreements to fix price found in any market manipulation which artificially stimulates price). A combination whose effect is the "raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce" is illegal and in violation of the Sherman Act. *Id. Contra* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730-31 (1988) (Court determined that vertical restraints that simply effect price are to be judged under Rule of Reason rather than per se prohibition).

13. *See* Business Electronic Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730-31 (1988) (vertical price fixing not illegal per se unless explicit agreement on price). *Contra* Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 399-402 (1911) (agreements which explicitly fix or implicitly affect prices are illegal per se).

14. *See* Jefferson County Pharmaceutical Ass'n v. Abbott Labs, 460 U.S. 150, 170 (1983) (quoting *in part* United States v. Cooper Corp., 312 U.S. 600, 606 (1941)) (Congress is ultimate antitrust policy-maker). In commenting on the controversy over the propriety of previous antitrust legislation, the Court stated that: "[a]lthough Congress is well aware of these criticisms . . . it certainly is not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *Id.* This deference by the judiciary to the legislative branch in the field of antitrust policy has come under attack by the Chicago School. *See generally* Posner, *Statutory Interpretation in the Classroom and the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983) (Congressional intent is subservient to common law). Judge Posner stated that: "[i]f the legislature enacts into statutory law a common law concept, as Congress did when it forbade agreements in 'restraints of trade' in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle—in which event the values of the framers may not be controlling after all." *Id.*

15. *See* J. HUGHES, AMERICAN ECONOMIC HISTORY 233 (1987) (history of Industrial Revolution and economic age); S. MORRISON, H. COMMAGER & W. LEUCHTENBERG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 371 (1983) (history of Industrial Revolution). The era from 1870-1920 can truly be called the Industrial Revolution. *Id.*

16. *See* 15 U.S.C. § 1 (1988) (contracts, combinations or conspiracies in restraint of trade are illegal); 15 U.S.C. § 2 (1988) (agreements or attempts to monopolize are illegal). Section 1 of the Sherman Antitrust Act provides that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or

facturers had absorbed multiple levels of the production process.[17] Vertical integration takes place when a manufacturer acquires the means of distributing and/or retailing its own product.[18] In so doing, manufacturers narrow or even eliminate competition among retail dealers of their products, known as intrabrand competition,[19] in an attempt to promote the competitiveness of their products in the market of comparable goods, which is known as interbrand competition.[20] To effectuate this integration, manufacturers imposed non-price vertical restraints, such as territorial[21] or customer assignments,[22]

---

with foreign nations, is hereby declared to be illegal." *Id.* Furthermore "[e]very person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" is acting in violation of the law. 15 U.S.C. § 2 (1988).

17. *See* S. MORRISON, & H. COMMAGER, & W. LEUCHTENBERG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 371 (1983) (history of Industrial Revolution). Large corporations, known as trusts, sought to expand their operations and capture the resources of the production of their goods. *Id.* By allocating resources to purchase all elements of the production process of their own goods these trusts had vertically integrated. *Id.* Further, these trusts sought to horizontally integrate by entering into agreements with their competitors to fix prices and stifle competition. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 396-401 (1927) (all horizontal price fixing agreements are illegal per se).

18. *See generally* R. POSNER, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 133-35 (1974) (nature of vertical restraints).

19. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 (1977) (intrabrand competition is among retailers of same name brand product); *see also* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 725-27 (1988) (intrabrand competition is not prime concern of antitrust legislation). *See generally* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 18-22 (1981) (discussion of merits and disadvantages of balancing test between interbrand and intrabrand competition). Competition in the marketplace is the sum of various factors, the propriety of which cannot be properly addressed through a balancing test. *Id.* Instead, the merits of restricted distribution arrangements need be determined by a statistical analysis of the market situation to see if such an arrangement has procompetitive affects and results in greater economic efficiency. *Id.* at 21-22.

20. *See Continental T.V., Inc.*, 433 U.S. at 52 n.19 (interbrand competition is among retailers of same product manufactured by different companies); *Business Electronics Corp.*, 485 U.S. at 725-28 (interbrand competition is prime concern of antitrust legislation), Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (goal of antitrust laws is to stimulate interbrand competition).

21. *See Continental T.V., Inc.*, 433 U.S. at 52-54 (non-price vertical restraints, such as territorial restraints, legal under Rule of Reason); United States v. White Motor Co., 372 U.S. 253, 258-61 (1963) (vertical allocation of dealer territory legal under Rule of Reason); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420-21 (D.C. Cir. 1957) (exclusive dealerships are legal under Rule of Reason so long as does not create monopoly). *See generally* Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 402-04 (1966) (geographic market division is governed by Rule of Reason).

22. *See* United States V. Topco Associates, Inc., 405 U.S. 596, 610-12 (1972) (attempt to divide customer market is attempt to monopolize which is illegal per se); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 264-68 (1899) (any agreement between businesses performing similar services or dealing in similar products to divide up the market place is

as well as price based vertical restraints, which entailed the assigning of minimum[23] and maximum vertical prices.[24]

In 1890, Congress responded to the growing problem of vertical price fixing by passing the Sherman Act, which became the wellspring of subsequent antitrust policy.[25] The framers of the Sherman Act clearly intended "to protect competition not competitors."[26] The Sherman Act provided that "[e]very contract, . . . combination . . ., or conspiracy in restraint of trade, . . . is declared to be illegal . . . ."[27]

The Supreme Court first applied this language to vertical price fixing in the landmark case of *Dr. Miles Medical Co. v. John Park & Sons Co.*.[28] In *Dr. Miles*, a manufacturer of medicines sought to protect its unpatented formula by expressly requiring its wholesalers and subsequent retailers to adhere to a mandatory minimum price.[29] A group of discount chemists filed suit alleging that the contract violated the Sherman Act because it restrained trade by prohibiting wholesalers from selling to the discount chemist.[30] The Supreme Court, construing the Sherman Act, determined that contracts, combinations and conspiracies to set minimum price levels were illegal per se, and thus nullified the Dr. Miles contract.[31] The Court found that once the manufacturer parts with his goods by selling them to a wholesaler, dis-

---

illegal per se). *See generally* Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division*, 75 YALE L. J. 373, 403-04 (1966) (agreements which divide market tend to create monopolies and are illegal per se).

23. *See* Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 407-09 (1911) (agreements which fix minimum vertical prices are illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1975) (minimum vertical price restraints are illegal per se).

24. *See* Albrecht v. The Herald Co., 390 U.S. 145, 151-53 (1968) (termination of dealer for charging in excess of maximum price restraint was illegal per se); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214 (1951) (agreement among competitors setting maximum vertical price is illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 289-90 (1975) (maximum vertical price restraints are illegal per se).

25. 15 U.S.C. § 1 (1988).

26. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

27. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Antitrust Act provides that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

28. 220 U.S. 373 (1911).

29. *Id.* at 374-76. The manufacturer of a secret but unpatented formula sought to protect its investment by instituting a contractual arrangement to fix retail prices. *Id.*

30. *Id.* at 381-83. A group of chemists who had been charging less than the price mandated by the manufacturer brought suit alleging that the contractual provision was in violation of the Sherman Act. *Id.*

31. *Id.* at 408-09.

tributor, or retailer, it may not restrict future competition at other levels of the distribution chain by requiring continued compliance with a minimum price restraint.[32]

Forty years later, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[33] the Supreme Court applied the per se rule to invalidate maximum price restraints.[34] In *Kiefer-Stewart*, a wholesaler brought an action against his supplier for illegally fixing maximum retail prices.[35] The Court held that agreements which set a maximum price are also illegal per se.[36] The Court concluded that Congress intended through the Sherman Act to declare all price-fixing, maximum or minimum, as inimical to a free market because it cripples natural market forces by inhibiting the capacity of competitors to establish prices based upon their own economic judgment.[37] In the *Dr. Miles* and *Kiefer-Stewart* decisions, the Supreme Court interpreted the intent of the Sherman Act to demand the legal nullification of agreements which fix maximum or minimum prices.[38]

The rule stating that vertical price fixing is illegal per se became a pillar of antitrust jurisprudence.[39] This rule rested upon the Sherman Act's require-

---

32. *Id.* at 405. After they are sold, a manufacturer has no control over the goods he manufactures. *Id.* It is illegal for the manufacturer to assert control over the price of a good once sold because to do so is to restrict competition at lower levels of the chain of distribution. *Id.*

33. 340 U.S. 211 (1951).

34. *Id.* at 213-14. Maximum price fixing is just as inimical to a free market economy as is minimum price fixing. *Id.*

35. *Id.* at 212-13. In *Kiefer-Stewart*, the Court allowed a price fixing wholesaler to recover damages from a price fixing supplier. *Id.* at 215.

36. *Id.* at 213-14. The Court reasoned that even though the competitors were free to charge whatever price they wished below the maximum price, the presence of a maximum price restraint acted to artificially establish prices and distort the allocation of resources in the marketplace. *Id.* at 212-13. Therefore, a price fixing agreement which tends to establish maximum prices is illegal per se under the Sherman Act. *Id.* at 215. *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 288-90 (1975) (vertical price restraints which set maximum price levels are illegal per se).

37. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951) (agreement among competitors setting maximum vertical price is illegal per se). Maximum as well as minimum price restraints act as an artificial stimulus to the marketplace and therefore are inimical to the functioning of a free market economy. *Id.*

38. *Id.*; Dr. Miles Medical Co. v. John Park & Sons Co., 220 U.S. 373, 399-402 (1911) (agreements which fix minimum vertical prices are illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 288-90 (1975) (vertical price restraints which set maximum or minimum price levels are illegal per se).

39. *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 289-91 (1975) (vertical price fixing historically illegal per se).

ment that any contract, combination or conspiracy which affects price or "tend[s] to restrict competition or decrease output" is illegal per se.[40] The Court stated that an agreement between a dealer and a manufacturer to undercut and thereby eliminate a discount dealer constitutes illegal price fixing under the Sherman Act.[41] Through *Dr. Miles* and its progeny, the Court established that vertical price fixing agreements are illegal per se because of their deleterious effect on competition.[42]

---

40. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 19-20 (1977) (per se rule applies to restraints which stifle competition); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692 (1978) (restraints which have anticompetitive impact on trade are illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (restraints with market impact on price are illegal per se); United States v. General Motors Corp., 384 U.S. 127, 147 (1966) (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); United States v. Frankfort Distilleries, 324 U.S. 293, 296 (1945) (price fixing is illegal under Sherman Act even though affects only local prices); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 728 (1944) (express agreement or acquiescence to agreement to fix prices is illegal per se); United States v. Masonite Corp., 316 U.S. 265, 276 (1942) (fixing prices by one member of group pursuant to express delegation, acquiescence or understanding of others is illegal per se); Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941) (vertical price fixing tends to create monopolies and lessen competition and is illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 153 (1940) (vertical price fixing is illegal per se); *Dr. Miles Medical Co.*, 220 U.S. at 399-402 (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se). *See generally* Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 397-404 (1966) (agreements which divide market and tend to create monopolies have been judged to be illegal per se); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1975) (vertical price restraints have been held illegal per se).

41. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 757-58 (1988)(Stevens, J. dissenting) (vertical agreements between manufacturer and retailer to terminate discount retailer are illegal); *General Motors*, 384 U.S. at 146-47 (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); *Dr. Miles Medical Co.*, 220 U.S. at 399-402 (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se). *See generally* Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 397-404 (1966) (agreements which divide market tend to create monopolies and are therefore illegal per se); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1975) (agreements between manufacturer and retailer to terminate discount retailer have been held illegal per se).

42. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (vertical restraints which affect price are deemed illegal per se and it is presumed that affect on price was motivating factor); *see also* Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 19-20 (1979) (per se rule applies to vertical restraints because sole purpose is to stifle competition); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (price fixing is illegal per se); United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1927) (reasonableness of price will not be examined since price restraints are presumed illegal); *Dr. Miles Medical Co.*, 220 U.S. at 399-402 (agreements or combinations between dealers which have purpose

III. STATUTORY EVOLUTION OF PER SE RULE AS APPLIED TO VERTICAL PRICE FIXING

The 1890 enactment of the Sherman Antitrust Act by Congress instituted, among other things, a prohibition against vertical price fixing.[43] During this same period, the states sought to regulate intrastate commerce through the enactment of what are now known as the "Fair Trade Laws."[44] The "Fair Trade Laws" permitted a manufacturer of goods to provide in a sales contract a provision stating the minimum, maximum or actual selling price for its product.[45] Since these laws sanctioned contracts which affected goods sold in interstate commerce, federal courts voided them as violative of the Sherman Act.[46] However, as part of the effort to stablilize price levels dur-

---

of destruction of competition are illegal per se); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 264-268 (1899) (agreement amongst competitors to set prices and divide territories are illegal since has affect on price); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 339-43 (1897) (horizontal agreements between competitors to set rates are presumed illegal). *See generally* Bork, *The Rule of Reason and The Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 397-404 (1966) (vertical agreements tend to create monopoly power over prices and are therefore to be held illegal per se); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1975) (agreements between manufacturer and retailer to terminate discount retailer have been held illegal per se since sole purpose is manipulation of price).

43. *See Dr. Miles Medical*, 220 U. S. at 373 (Sherman Act was enacted to provide that agreements or combinations between dealers which develop vertical price fixing scheme are illegal per se); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 153 (1940) (one purpose of Sherman Act was to establish that agreements amongst competitors as well as members of distribution chain, such as vertical price fixing, are illegal per se); *Trenton Potteries Co.*, 273 U.S. at 396 (per se prohibition of Sherman Act is without exception for reasonableness of agreement).

44. *See* Pepsodent Co. v. Kraus Co., 56 F. Supp. 922, 923-27 (D. La. 1944) (detailed history of Congressional intent to allow states to enact Fair Trade Laws).

45. *See* P. AREEDA, ANTITRUST ANALYSIS 407 (1988) (discussion of Fair Trade Laws and non-signer clauses). The Sherman Act was amended in 1937 to exempt "agreements prescribing minimum prices for . . . a commodity which . . . is in free and open competition with commodities of the same general class produced or distributed by others" when such arrangements are legal under state law. *See* Miller-Tydings Act, 1937 U.S. CODE CONG. ADMIN. NEWS (50 Stat.) 693 (*repealed by* Consumer Goods Pricing Act, Pub. L. No. 94-145, 1975 U.S. CODE CONG. ADMIN. NEWS (89 Stat.) 801 (amending 15 U.S.C. §§ 1, 45 (a) (1988))). The Fair Trade Laws as they have come to be known, allowed the manufacturer to enforce vertical price fixing schedules against all retailers so long as the manufacturer was able to secure a contractual agreement with a single retailer to abide by the arrangement. *See* P. AREEDA, ANTITRUST ANALYSIS 407 (1988) (non-signer clauses). In essence, the Fair Trade Laws allowed enforcement of vertical price fixing schemes against all retailers under a theory that to bind one retailer was to bind them all. *Id.*

46. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (contractual restraints which have impact on price are illegal per se); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 296 (1945) (price fixing is illegal under Sherman Act); United States

ing the Great Depression, the New Deal Congress passed the Miller-Tydings Act[47] which revived the "Fair Trade Laws"[48] by exempting them from the scope of the Sherman and McGuire Acts.[49] Miller-Tydings thus permitted manufacturers to engage in limited vertical price fixing.[50] By 1975, however, Congress and the Ford administration[51] turned against the "Fair Trade Laws," with Congress eliminating them by passing the Consumer Goods Pricing Act.[52] Congress had determined that the vertical price fixing inher-

---

v. Masonite Corp., 316 U.S. 265, 276 (1942) (fixing prices through an express delegation, acquiescence or understanding is illegal per se); Fashion Originator's Guild v. FTC, 312 U.S. 457, 466 (1941) (vertical price fixing agreements are illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (vertical price fixing is illegal per se); United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1927) (reasonableness of price will not excuse illegality of vertical price restraints); Dr. Miles Medical Co. v. John Park & Sons, 220 U.S. 373, 399-402 (1911) (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se).

47. 15 U.S.C. § 1 (1988); 15 U.S.C. §§ 1, 45 (1988). The McGuire Act together with § 1 of the Sherman Antitrust Act prohibited restraints on trade. *Id.* Section 1 of the Sherman Act specifically provided that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988).

48. 15 U.S.C. § 1 (1988). The Sherman Act was amended in 1937 by the Miller Tydings Act in order to exempt "agreements prescribing minimum prices for the resale of a commodity which . . . is in free and open competition with commodities of the same general class produced or distributed by others" when such arrangements are legal under state law. *Id.*

49. 15 U.S.C. § 45 (1988). The Miller-Tydings Act amended the Sherman Act and opened the avenue for the "Fair Trade Laws" by allowing the states to enact legislation which would make vertical price fixing a permissible practice. 15 U.S.C. § 1 (1988).

50. *Id.* The Miller-Tydings Act allowed the imposition of vertical price restraints by manufacturers under the guise of non-signer clauses. *Id.* The Act amended the Sherman Act to provide for "non-signers clauses." *Id.* This meant that agreements between a manufacturer and an individual retailer were enforceable against the signer of the agreement as well as all non-signers once the manufacturer had entered into such an agreement with a single retailer. *Id.*

51. *See* P. AREEDA, ANTITRUST ANALYSIS 407 (1988) (history of Fair Trade Laws). During the Ford Administration, 1974-1976, the Administration, the Federal Trade Commission, and the Congress called for the repeal of the Fair trade Laws. *Id.* It was estimated that the enforcement of the non-signer clauses and the resulting vertical price fixing added at least 18 to 27% to the price of each and every good sold under such an agreement. *See* S. REP. NO. 466, 94th Cong., 1st Sess. 1-3 *reprinted in* 1975 U.S. CODE CONG. ADMIN. NEWS 1569 (1975) (Fair Trade laws were costly to economy).

52. *See* Consumer Goods Pricing Act, Pub. L. No. 94-145, 1975 U.S. CODE CONG. & ADMIN. NEWS (89 Stat.) 801 (amending 15 U.S.C. §§ 1, 45(a)(1988)). The Consumer Goods Pricing Act amended the Sherman Act in order to make the Fair Trade Laws unenforceable. *Id.*; *see also* P. AREEDA, ANTITRUST ANALYSIS 407 (1988) (history of Fair Trade Laws). During the Ford Administration, 1974-1976, the Administration, the Federal Trade Commission, and the Congress called for the repeal of the Fair Trade Laws. *Id.* It was estimated that the enforcement of non-signer clauses and the resulting vertical price fixing added at least 18 to 27% to the price of each and every good sold under such an agreement. *See* S. REP. NO. 466,

ent in the "Fair Trade Laws" was inimical to a free market economy and reasserted the per se prohibition against vertical price restraints.[53]

IV. THE NATURE OF AGREEMENTS WHICH RESTRAIN TRADE

Historically, courts held that a contract, combination, or conspiracy in restraint of trade need not be express but may be implied when a group of retailers is coerced into acquiescence to a scheme which has the effect of fixing retail prices.[54] Vertical price fixing agreements stifle intrabrand competition by imposing a uniform price, which eliminates any price competition between full service retailers, who charge a higher price but offer better services, and discount retailers, who sell at a lower price but offer few or no services.[55] However, the courts and Congress demonstrated a firm resolve to ensure unrestrained intrabrand and interbrand competition.[56]

Vertical price fixing involves an agreement which has the purpose and effect of manipulating prices.[57] In order to be deemed a per se illegal con-

---

94th Cong., 1st Sess. 1-3, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1569 (1975) (Fair Trade Laws were costly to economy).

53. *Id.* The Consumer Goods Pricing Act reestablished the force of the Sherman Act making "it illegal for manufacturers to fix the prices of consumer products sold by retailers." *See* Public Papers of President Gerald R. Ford, vol. 11, no. 50, at 1368.

54. *See* United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944) (express or implied agreement to agreement to fix prices is illegal per se); United States v. Masonite Corp., 316 U.S. 265, 276 (1942) (fixing prices pursuant to an express delegation, acquiescence or understanding is illegal per se).

55. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724-27 (1988) (prohibition of vertical restraints as a detriment to competition is misguided and futile effort); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-56 (1977) (vertical restraints reduce intrabrand competition but arguments exist that such loss is merited by increase in interbrand competition).

56. *See* P. AREEDA, ANTITRUST ANALYSIS 407 (1988) (repeal of Fair Trade Laws demonstrates Congressional resolve to prohibit vertical price fixing). In determining that the Fair Trade Laws and vertical price fixing were inimical to a free market economy, it was estimated that the enforcement of the laws and the resulting vertical price fixing added at least 18 to 27% to the price of each and every good sold under such an agreement. *See* S. REP. NO. 466, 94th Cong., 1st Sess. 1-3, *reprinted in* 1975 U.S. CODE CONG. ADMIN. NEWS 1569 (1975) (Fair Trade Laws were costly to economy and should be abolished). The Consumer Goods Pricing Act therefore made the Fair Trade Laws unenforceable. Pub. L. No. 94-145, 1975 U.S. CODE CONG. & ADMIN. NEWS (89 Stat.) 801 (amending 15 U.S.C. §§ 1, 45(a) (1988)). The Consumer Goods Pricing Act reestablished the force of the Sherman Act making "it illegal for manufacturers to fix the prices of consumer products sold by retailers." *See* Public Papers President Gerald R. Ford, vol. 11, no. 50, at 1368 (Act effectively abolished "Fair Trade Laws").

57. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-51 (1982) (agreements to fix a minimum or maximum price are illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (agreements to fix price are found in any market manipulation which artificially stimulates price). A combination whose effect is the "raising, depress-

tract, combination, or conspiracy to manipulate prices, the conduct must be a bilateral activity.[58] A bilateral agreement to fix prices occurs when there is a meeting of the minds between two parties which has the purpose or effect of manipulating prices.[59] If, however, the conduct is unilateral, no violation of the antitrust laws will occur.[60] The Supreme Court addressed unilateral conduct in *United States v. Colgate & Co.*[61]

In *Colgate*, a distributor decided to sell only to retailers who would abide by its price fixing schedule.[62] The Supreme Court created an exception to the per se rule by holding that this policy did not violate the Sherman Act since the policy involved unilateral pricing.[63] However, the Supreme Court has narrowly applied the *Colgate* exception to the vertical price fixing prohibition.[64] The Court noted that an illegal contract, combination, or conspir-

---

ing, fixing, pegging or stabilizing the price of a commodity in interstate of foreign commerce" is an illegal vertical restraint in violation of the Sherman Act. *Id.*

58. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 n.9 (1984) (manufacturer must seek acquiescence or agreement from distributor who must in turn communicate his acceptance); United States v. Colgate Co., 250 U.S. 300, 307 (1919) (no illegal vertical restraint occurs absent a bilateral agreement). Unilateral announcement of a policy to sell only to retailers who abide by a price schedule with automatic termination for violations is not illegal per se under the Sherman Act because no bilateral agreement has occurred and therefore there can be no contract, combination, or conspiracy in restraint of trade. *Id.* at 306-07.

59. *See* United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978) (bilateral conduct exists when parties are aware that their conduct will have an effect). An agreement between parties shall have been deemed to have occurred when the parties are aware that their conduct will cause a particular affect. *Id.*

60. *See, e.g.*, David-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1196-97 (6th Cir. 1982) (unilateral action is not violation of Sherman Act), *cert. denied*, 466 U.S. 931 (1984); Sierra Wine and Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132-33 (9th Cir. 1980) (termination of discount retailer based upon unilateral decision is not illegal); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 (8th Cir. 1976) (if refusal to deal is unilateral, no violation of Sherman Act has occurred), *cert. denied*, 433 U.S. 914 (1977).

61. 250 U.S. 300, 306-07 (1919). Unilateral announcement of a policy to sell only to retailers who abide by a price schedule with automatic termination for violations is not illegal per se under the Sherman Act because no bilateral agreement has occurred and therefore there can be no contract, combination or conspiracy in restraint of trade. *Id.* at 307.

62. *Id.* at 303-06.

63. *Id.* at 307. The plaintiff needs to prove that the conduct was bilateral in order to prevail. *Id.* If, however, the conduct is merely unilateral action, no violation of the Sherman Act has occurred since there can be no contract, combination or conspiracy without an agreement between two or more parties. *See, e.g.*, *Davis-Watkins Co.*, 686 F.2d at 1196-97 (bilateral action must be shown to prevail since unilateral action is not violation of Sherman Act), *cert. denied*, 466 U.S. 931 (1984); *Sierra Wine and Liquor Co.*, 626 F.2d at 132-33 (termination of a discount retailer is not bilateral action for purposes of Sherman); *Quality Mercury, Inc.*, 542 F.2d at 469 (absent bilateral action, no violation of Sherman Act has occurred), *cert. denied*, 433 U.S. 914 (1977).

64. *See* United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960) (*Colgate* exception applies only when no agreement exists).

acy occurs "when a manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his vertical prices . . . ."[65] The *Colgate* exception allows a manufacturer to announce a resale price and enforce compliance by refusing to sell to retailers who do not maintain the fixed resale price so long as the retailer is free to choose not to comply.[66]

Regarding non-price vertical restraints, courts have applied a Rule of Reason standard to judge whether vertical restraints imposed by a manufacturer, such as geographic,[67] customer list,[68] or tying restrictions,[69] violate the per se rule.[70] In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[71] the

---

65. *Id.*; *see also* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984) (manufacturer has right to determine with whom he will deal and can announce vertical pricing policy and may unilaterally determine whether or not to cut off discount retailer); United States v. Colgate Co., 250 U.S. 300, 307 (1919) (manufacturer may make independent decisions about circumstances under which he will sell).

66. *See Parke, Davis & Co.*, 362 U.S. at 44 (scope of *Colgate* exception). The *Colgate* exception is limited to instances in which there is no agreement, neither express nor implied. *Id.* Anything in addition to the mere announcement of prices and a refusal to deal with violators is illegal per se. *Id.*

67. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52-53 (1977) (non-price vertical restraints such as territorial restraints are legal as judged under Rule of Reason); White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (vertical allocations of dealer territory are legal under Rule of Reason); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420-21 (D.C. Cir. 1957) (sole outlets are legal under Rule of Reason so long as does not create monopoly).

68. *See* United States v. Topco Associates, Inc., 405 U.S. 596, 607-08 (1972) (attempt to divide customer market is attempt to monopolize which is illegal under the Rule of Reason); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 230-32 (1899) (any agreement between businesses performing similar services or dealing in similar products to divide up marketplace is illegal under Rule of Reason).

69. *See* United States v. Jerrold Electronics, 187 F. Supp. 545, 561-62 (E.D. Pa. 1960) (tying arrangements used to promote new industry are judged under Rule of Reason); Standard Oil v. United States, 337 U.S. 293, 305-06 (1949) (defense that tying arrangement needed in order to protect goodwill is judged under Rule of Reason). A tying arrangement takes place when a seller seeks to use its market power in order to capture a similar market share in another product. *Id.* at 306-08 (tying arrangements tie together purchases of two or more products). In order for a tying arrangement to be considered illegal, there must be separate tying and tied products; the seller must have sufficient market power to restrain competition in the tied product; and the tying arrangement must have more than a *de minimis* affect on commerce. *Id.* at 313-15 (tying arrangements may be permissive if justified in order for manufacturer to survive so long as minimal market effect is caused).

70. *See Continental T.V., Inc.*, 433 U.S. at 553 (non-price vertical restraints such as territorial restraints are legal as judged under Rule of Reason). In judging whether or not a non-price vertical restraint is illegal under the Rule of Reason, all circumstances are to be weighed by the trier of fact. *Id.* Only those restrictions which "would always or almost always tend to restrict competition and decrease output" are illegal per se. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985) (purchasing cooperatives are procompetitive by increasing economic efficiency).

Supreme Court stated that some non-price vertical restraints can create efficiencies in the chain of distribution and enhance interbrand competition.[72] The Rule of Reason enables courts to balance the competition-enhancing aspects of a non-price vertical restraint against their anticompetitive effects in order to determine their legality.[73]

V. THE LEGAL IMPACT OF THE PER SE RULE: THE ACADEMIC DEBATE

Until the *Sharp* decision, the United States Supreme Court generally held vertical price fixing to be illegal per se. However, two schools of thought developed as to the propriety of this policy: the Harvard School and the Chicago School. The Harvard School approved the Supreme Court's pre-*Sharp* antitrust jurisprudence and thereby asserted the general policy that restraints on vertical prices are per se illegal.[74] Three tenets form the basis

---

71. 433 U.S. 36, 52 n.19 (1977) (Court stated that enhancement of interbrand competition, which is competition among different brands of the same product, is foremost concern of Sherman Act); *see also* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 725-27 (1988) (intrabrand competition is not prime concern of antitrust legislation but rather interbrand is primary concern). *See generally* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 18-22 (1981) (discussion of policy behind interbrand and intrabrand competition). Interbrand competition is the primary concern of antitrust law because it seeks economic efficiency amongst all competing brands rather than within an individual brand. *Id.*

72. *See Continental T.V., Inc.*, 433 U.S. at 52 (vertical restraints enhance intrabrand competition).

73. *Id.* at 57-59 (Rule of Reason is balancing test). In judging whether or not a non-price vertical restraint is illegal under the Rule of Reason, all circumstances are to be weighed by the trier of fact. *Id.* Only those restrictions which "would always or almost always tend to restrict competition and decrease output" are illegal per se. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Print Co., 472 U.S. 284, 289 (1985) (Rule of Reason weighs economic efficiency).

74. *See* Report by the House Judiciary Committee on the Price Fixing Prevention Act of 1989, 835 Trade Reg. Rep. (CCH) 10-12 (April 11, 1990) (discussion of divergence of Chicago School from Harvard School). The policy of antitrust legislation and judicial interpretation thereof has historically been the per se prohibition of vertical price fixing. *Id.*; *see also* National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (vertical price restraints are illegal per se); Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (restraints with market impact on price are illegal per se); United States v. General Motors Corp., 384 U.S. 127, 147 (1966) (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); United States v. Frankfort Distilleries, 324 U.S. 293, 296 (1945) (price fixing is illegal under Sherman Act even though affects only local prices); Fashion Originator's Guild v. FTC, 312 U.S. 457, 466 (1941) (vertical price fixing creates monopoly power and is illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 153 (1940) (vertical price fixing is illegal per se); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 62 (1926) (express or tacit price restraints are illegal); Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 399-402 (1911) (agreements or combinations between dealers which have affect on price are illegal per se).

of the Harvard School's analysis of vertical restraints, namely: (1) if an agreement directly or indirectly sets prices, then it is price fixing which is illegal per se;[75] (2) if an agreement is a non-price vertical restraint, the Rule of Reason applies;[76] and (3) if an agreement affecting prices occurs within a single business entity, i.e., a subsidiary or agent then no violation occurs.[77]

While the Harvard School maintains that vertical agreements which explicitly state price and those which affect price are illegal per se,[78] the Chicago School applies the per se prohibition only to those vertical price fixing

---

75. *See Nat'l Soc'y of Professional Engineers*, 435 U.S. at 688 (restraints which have impact on price are illegal per se); *Continental T.V., Inc.*, 433 U.S. at 49-51 (restraints with market impact on price are illegal per se); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979) (per se rule applies to restraints which affect price); *General Motors*, 384 U.S. at 147 (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); *Frankfort Distilleries*, 324 U.S. at 296 (price fixing is illegal under Sherman Act even though affects only local prices); United States v. Masonite Corp., 316 U.S. 265, 276 (1941) (fixing prices by one member of group pursuant to express delegation, acquiescence or understanding is illegal per se); United States v. Fashion Originator's Guild, 312 U.S. 457, 466 (1941) (vertical price fixing tends to create monopoly power over prices and is illegal); *Socony-Vacuum Oil Co.*, 310 U.S. at 153 (vertical price fixing is illegal per se); *Pacific States Paper Trade*, 273 U.S. at 62 (express or tacit agreement on price is illegal); *Dr. Miles Medical Co.*, 220 U.S. at 399-402 (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se).

76. *See Continental T.V., Inc.*, 433 U.S. at 52-53 (non-price vertical restraints are legal as judged under Rule of Reason). The application of the Rule of Reason is within the province of the jury to determine whether, through the facts shown, a contract, combination, or conspiracy in restraint of trade has arisen. *Id.* The presumption is in favor of the legality of the restraint and only those restrictions which "would always or almost always tend to restrict competition and decrease output" are illegal per se. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985) (purchasing cooperatives are judged legal under Rule of Reason).

77. *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984) (manufacturer has right to determine with whom he will deal, can announce vertical pricing policy and may unilaterally determine whether or not to cut off a discount retailer); United States v. Parke, Davis & Co., 362 U.S. 29, 35-47 (1960) (any attempt to induce compliance with vertical price fixing scheme beyond mere unilateral action is illegal per se); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452 (1922) (manufacturers may use unilateral action to institute vertical price fixing scheme but may not use concerted activity); United States v. Colgate Co., 250 U.S. 300, 307 (1919) (manufacturer may make independent decisions about the circumstances under which he will sell).

78. *See* National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (restraints with anticompetitive impact on price are illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (agreements which affect price are illegal); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979) (restraints with detrimental effect on price competition are illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restrict Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 290 (1979) (vertical price restraints have been traditionally held illegal per se).

agreements which explicitly state price.[79] This fundamental distinction has lead to substantially divergent approaches to antitrust jurisprudence. The Chicago School posits four basic tenets in its approach to vertical price restraints, namely: (1) if an agreement directly states a price, then it is vertical price fixing, which is illegal per se;[80] (2) if an agreement does not directly state a price, but merely affects prices indirectly, it is a non-price vertical restraint to be adjudged under the Rule of Reason;[81] (3) if an agreement imposes a non-price vertical restraint, then the Rule of Reason applies;[82] and (4) if an agreement affects only a single business entity, i.e. a subsidiary or agent then no violation occurs.[83]

---

79. *See* Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 399-402 (1911) (agreements or combinations between dealers which have affect on price are illegal per se). *Contra* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 735-36 (1988) (case altered precedent by holding that only agreements which explicitly state price are illegal per se rather than all agreements which affect price).

80. *See* United States v. Frankfort Distilleries, 324 U.S. 293, 296 (1945) (price fixing is illegal under Sherman Act even though affects only local prices); United States v. Masonite Corp., 316 U.S. 265, 276 (1941) (fixing prices by one member of group pursuant to express delegation, acquiescence or understanding of others is illegal per se); Fashion Originator's Guild v. FTC, 312 U.S. 457, 466 (1941) (contract providing for vertical price fixing is illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 153 (1940) (vertical price fixing is illegal per se); FTC v. Pac. States Paper Trade Ass'n., 273 U.S. 52, 62 (1927) (express or tacit agreement on price is illegal); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 399-402 (agreements between dealers which provide for vertical price fixing are illegal per se).

81. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979) (all vertical restraints are subject to Rule of Reason unless they stifle competition and decrease economic efficiency); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 690 (1978) (Court will look at nature of restraint and surrounding circumstances to determine competitive merits of restraint); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 (1977) (non-price vertical restraints cannot be absolutely prohibited because they have potential to stimulate interbrand competition despite reduction in intrabrand competition). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283-99 (1975) (procompetitive merits of vertical restraints).

82. *See* Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 57-59 (1977) (non-price vertical restraints such as territorial restraints are legal under Rule of Reason); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Print Co., 472 U.S. 284, 289 (1985) (purchasing cooperatives are procompetitive by increasing economic efficiency). Only those restraints which clearly have anticompetitive effects on the market place are to be deemed illegal. *Id.*

83. *See, e.g.*, Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1196-97 (6th Cir. 1982) (unilateral action is not violation of Sherman Act), *cert. denied*, 466 U.S. 931 (1984); Sierra Wine and Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132-33 (9th Cir. 1980) (termination of discount retailer based upon unilateral decision not illegal); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 (8th Cir. 1976) (if refusal to deal is unilateral, no violation of Sherman Act has occurred, but if more than unilateral action such action is illegal combination), *cert. denied*, 433 U.S. 914 (1977).

Judges such as Robert Bork and Richard A. Posner have integrated the Chicago School's approach into common law antitrust policy.[84] They contend that vertical price fixing sometimes may produce efficient results, thus meriting the use of the Rule of Reason, even though that rule is normally used only to judge vertical non-price restraints.[85] The Chicago School and its subscribers believe that only horizontal restraints, that is, restraints which affect *interbrand competition*, are illegal per se.[86] The Chicago School recognizes that the Rule of Reason should sometimes apply to vertical restraints because competition among distributors of the same brand differs fundamentally from competition among distributors of different brands of the same product.[87] The Chicago School asserts that manufacturers who support

---

84. *See Continental T.V., Inc.*, 433 U.S. at 53 (argument can be made that decreases in intrabrand competition are legal based upon procompetitive benefits gained in interbrand competition). *See generally* R. BORK, THE ANTITRUST PARADOX 280 (1978) (discussing Chicago School approach to vertical price fixing); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (vertical price fixing agreements should be legal per se); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV 282, 283-99 (1975) (vertical restraints offer procompetitive benefits). The Chicago School of Antitrust argues that vertical price fixing has little or no affect on the economy and in fact has procompetitive benefits. *See* R. BORK, THE ANTITRUST PARADOX 280 (1978) (vertical price fixing enhance interbrand competition); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283-99 (1975) (decrease in intrabrand competition caused by vertical price fixing is merited by increase in interbrand competition). Commentators have urged that vertical price fixing be deemed legal per se as a part of the Chicago School approach to shift the focus of antitrust protection away from intrabrand competition. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (per se legality of vertical price fixing would enhance competition).

85. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977) (non-price vertical restraints are judged under Rule of Reason). The trier of fact shall weigh all the circumstances in order to determine whether or not a non-price vertical restraint is illegal under the Rule of Reason. *Id.* Upon doing so, only those restrictions which "would always or almost always tend to restrict competition and decrease output" are illegal per se. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Print Co., 472 U.S. 284, 289-90 (1985) (Rule of Reason attempts to increase economic efficiency).

86. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 734-36 (1988) (horizontal restraints are illegal per se because sole purpose is detriment of price competition amongst competitors). *But see* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980) (price fixing in vertical cases is same as price fixing in horizontal cases). *See generally* E. GELLHORN, ANTITRUST LAW AND ECONOMICS 252, 256 (1976) (vertical restraints have affect of facilitating horizontal agreements); R. POSNER, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 134 (1974) (vertical restraints may be as inimical as horizontal restraints since acts as disincentive to break up cartels).

87. *See Business Electronics Corp.*, 485 U.S. at 724 (vertical restraints are procompetitive). The Court distinguished competition amongst retailers of different brands of the same product (interbrand competition) from competition amongst dealers of the same name brand product (intrabrand competition). *Id.* "[W]e found, they (vertical restraints) had real poten-

their distributors by eliminating discount distributors, (i.e., those who obtain a "free ride" on the marketing programs of full service dealers) produce the most efficient result for the market and should therefore be judged under the Rule of Reason.[88]

The Chicago School maintains that eliminating "free riders" will enhance interbrand competition and promote efficient markets.[89] The Chicago

---

tial to stimulate interbrand competition, 'the primary concern of antitrust law.' " *Id.* *See* R. BORK, THE ANTITRUST PARADOX 280 (1978) (vertical price fixing enhances interbrand competition); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 294-97 (1975) (decrease in intrabrand competition caused by vertical price fixing will be more than offset by increase in interbrand competition).

88. *See Business Electronics Corp.*, 485 U.S. at 723-30 (argument that vertical restraints have redeeming values); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 762-64 (1984) (manufacturer is justified in imposing vertical restraints in order to insure profit level sufficient for distributor to institute marketing strategy); *Continental T.V., Inc.*, 433 U.S. 55-56 (argument that vertical restraints promote effective distribution schemes). *See generally* R. BORK, THE ANTITRUST PARADOX (1978) (marketplace needs no protection from trade restraints); Tesler, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283-299 (1975) (vertical restraints have procompetitive benefits); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 389 (1966) (vertical restraints facilitate competition). The Chicago School argues that the imposition of vertical restraints in order to eliminate the "free rider" effect is justified. *Id.* at 430-438, 453. The "free rider" effect refers to the burden placed upon local sales of a name brand product when one distributor actively advertises the product and another simply saves that money which would have been expended on advertising and in essence takes a free ride on the efforts of his competitor. *Id.* The Chicago School states that vertical restraints aimed at the elimination of the "free rider" effect are justified since they promote the profitability of the name brand product by streamlining the distribution process. *Id.* If the "free rider" were to continue, the full service retailer would find it less profitable to sell the brand and therefore would make less effort to promote it. *Id.* Without the necessity to compete against a discount retailer who free rides upon the effort of a full service retailer, retailers subject to vertical restraints can pass on to consumers savings from the elimination of duplicated services. *Id.*

89. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977) (Chicago policy toward vertical restraints). One Chicago school commentator has stated that:

> [v]ertical restraints reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. . . . Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.

Id.; *see also* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 727-30 (vertical restraints may be cure for free rider affect); *Monsanto Co.*, 465 U.S. at 763-64 (manufacturer is justified in imposing vertical restraints in order to cure free rider affect); *Continental T.V., Inc.*, 433 U.S. at 55-56 (argument that vertical restraints promote effective distribution schemes by elimination of free riders). The imposition of vertical price fixing is simply an attempt by the manufacturer to protect those retailers whose marketing policies are in conformity with its wishes or give an incentive to others to act in conformity therewith. *See generally* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 148-49 (1976) (economic argument for vertical price fixing); Posner, *The Next Step in the Antitrust Treatment of*

School's policy for supporting vertical price restraints is based on the belief that the termination of "free riders" will increase interbrand competition and will force manufacturers to grant better warranties and better service support for their products in order to remain competetive with other brands of the same product.[90] However, the Harvard School contends that this problem can be better addressed through contractual provisions between retailers and consumers, which would obviate the harmful effects of vertical price fixing.[91] Finally, the Harvard School followers stated that the arguments espoused by the Chicago School should be addressed to the Congress rather than the judiciary because the Chicago theory is in direct opposition to the Congressional intent behind the Sherman Act.[92]

VI. THE INFLUENCE OF THE CHICAGO SCHOOL UPON THE DEPARTMENT OF JUSTICE

Through amicus briefs, procedural guidelines, and nonfeasance, the antitrust division of the Department of Justice has chosen to ignore the eighty years of precedent which established the per se illegality of vertical price restraints.[93] Because of their particular ideological approach to antitrust ju-

---

Restricted Distribution: Per Se Legality, 48 U. CHI. L. REV. 6 (1981) (vertical price fixing agreements should be legal per se to promote marketing scheme of manufacturer and prevent free rider affect); Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86, 89-96 (1960) (discussing vertical price fixing as incentive system); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 430-438, 453 (1966) (vertical restraints are economically efficient and should be legal to prevent free riders).

90. *Id. See generally* R. BORK, THE ANTITRUST PARADOX 280-98 (1978) (vertical price fixing protects distributors and retailers who undertake promotion projects and conduct other services to promote goodwill of product); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 148-49 (1976) (economic conditions for vertical price fixing); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (vertical price fixing agreements should be legal per se to promote manufacturer's marketing scheme and prevent affect of free rider); Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86, 89-96 (1976) (discussing an incentive system using vertical price fixing).

91. *See* Report by House Committee on the Judiciary on the Freedom from Vertical Price Fixing Act of 1987, 835 Trade Reg. Rep. (CCH) 13 (Nov. 16, 1987) (Harvard School contends that reasons enunciated for vertical price fixing can be better solved by contractual provision). *Contra* R. BORK, THE ANTITRUST PARADOX 280-98 (1978) (vertical price fixing protects distributors and retailers who undertake promotion projects and conduct other services to promote goodwill of product).

92. *See* Report by House Committee on the Judiciary on the Freedom from Vertical Price Fixing Act of 1987, 835 Trade Reg. Rep. (CCH) 13-15 (Nov. 16, 1987) (Harvard School follows legislative intent rather than court created law).

93. Report by the House Judiciary Committee on the Price Fixing Prevention Act of 1989, 835 Trade Reg. Rep. (CCH) 6-7 (April 11, 1990); Report by House Committee on the Judiciary on the Freedom from Vertical Price Fixing Act of 1987, 835 Trade Reg. Rep. (CCH) 14 (Nov. 16, 1987).

risprudence, the Department of Justice has not brought a single vertical price fixing charge in over ten years despite numerous appeals from civil litigants, and thus has abandoned legal action against manufacturers who impose vertical price restraints.[94]

In addition to the Justice Department's nonfeasance regarding the enforcement of the per se prohibition against vertical price fixing, the Department took positive steps towards overturning the per se rule, established by *Dr. Miles*, through amicus briefs on behalf of defendant manufacturers.[95] In the *Monsanto* case, the Department of Justice filed *amicus curiae* briefs with the Supreme Court supporting manufacturers charged with vertical price fixing.[96] In these briefs, the Justice Department urged the Court to overrule its longstanding decision in *Dr. Miles* and adopt the Rule of Reason approach to vertical price restraints enunciated by the Chicago School.[97]

The intervention of the Justice Department did not go unnoticed. Congress addressed the intervention of the Justice Department in the Department of Justice Appropriations Bill of 1984,[98] which contained a narrowly defined funding restriction that prohibited the Department from using public funds to pursue the overturning or altering of the per se prohibition against vertical price fixing.[99] This bill became law on November 28, 1983, and

---

94. Report by the House Judiciary Committee on the Price Fixing Prevention Act of 1989, 835 Trade Reg. Rep. (CCH) 2 (April 11, 1990).

95. Briefs for the United States as Amicus Curiae in Support of the Petitioner, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914); *see also*, Testimony of William F. Baxter, Antitrust Division, Department of Justice, Oversight Hearings, Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary 7 (97th Cong., 1st and 2d Sessions, 1983). Further, the Assistant Attorney General, Mr. Baxter, at a subcommittee meeting told the Congress that the Administration would not be actively seeking to enforce the vertical price fixing prohibition and went on to state that "there is no such thing as a harmful vertical practice." *Id.*

96. Briefs for the United States as Amicus Curiae in Support of the Petitioner, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) (No. 82-914).

97. *Id.* (citing Testimony of William F. Baxter, Antitrust Division, Department of Justice, Oversight Hearings, Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary at 7 (97th Cong., 1st and 2nd Sessions, 1983)). "Even if the evidence shows that Monsanto adopted the challenged marketing program as part of a vertical price fixing scheme, this Court should still vacate and remand because vertical price fixing should not be deemed per se unlawful." *Id.*

98. Department of Justice Appropriations Bill of 1984, Pub. L. No. 98-166, § 510, 1984 U.S. CODE CONG. & ADMIN. NEWS (97 Stat.) 1071, 1102-03 (1983).

99. Department of Justice Appropriations Bill of 1984, Pub. L. No. 98-166, § 605, 1984 U.S. CODE CONG. & ADMIN. NEWS (97 Stat.) 1071, 1102-03 (1983). Section 605 stated that the Department of Justice Guidelines were inconsistent with prior caselaw and the Congressional intent on any antitrust issues and that:

> certain price fixing conspiracies are legal if such conspiracies are 'limited' to restricting intrabrand competition; by blurring the distinction between price and nonprice restraints in analyzing the accepted rule that vertical price fixing in any context is illegal per se; in

similar restrictions have since been placed on the Department of Justice via restrictive appropriation bills.[100] In response, the Department of Justice promulgated its Vertical Guidelines of 1985 which suggested that it would not prosecute vertical price agreements so long as they were "ancillary" to an agreement which was primarily non-price in nature and did not set a "specific price."[101] While the Department of Justice stated that it would abide by Congress's decision to uphold the per se illegality of vertical price fixing, it went on to state that it would not actively prosecute wrongdoers.[102]

Frustrated by the resolve of the Department of Justice to circumvent the per se rule, Congress passed the Vertical Restraints Guidelines Resolution in 1985,[103] which stated that the Justice Department's Vertical Guidelines did not have the effect of law, and thus did "not accurately state the current antitrust law, and shall not be considered by the courts of the United States as binding or persuasive."[104] The resolution declared the Justice Depart-

---

stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to specific prices'; in stating that restraints imposed by a manufacturer at the request of dealers are non-price in nature and therefore not subject to the per se rule of illegality; in aggregating the factors of collusion and foreclosure, thereby failing to distinguish adequately between the separate antitrust concerns associated with vertical territorial restraints and with exclusive dealing practices; in stating that less than absolute territorial restraints are 'always legal'; and in arbitrarily specifying a 30 per centrum minimum market share in tying product for assessing the legality of tying arrangements.

Id. These restrictions prevented the Justice Department from arguing the Chicago School approach to the judiciary by restricting the use of public funds for such purposes. *See generally* Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 351, 359 (1985) (Congress uses power of purse to stifle Justice Department actions). However, it has been argued that serious constitutional problems are evoked by these funding restrictions. *Id.* The separation of powers provided in the Constitution seems clearly to be breached when the Justice Department is prohibited from speaking to the Supreme Court on antitrust matters despite a direct invitation to do so. *Id.* It has been stated that: "[T]he spectacle of the first branch of the federal government [the legislature] ordering the second branch [the executive] not to speak to the third raises serious constitutional problems." *Id.*

100. Department of Justice Appropriations Bill of 1984, Pub. L. No. 98-166, § 510, 1984 U.S. CODE CONG. & ADMIN. NEWS (97 Stat.) 1071, 1102-03 (1983).

101. Department of Justice Vertical Restraint Guidelines, 687 Trade Reg. Rep. (CCH) Part II (1985).

102. *Id.* Frustrated by the imposition of a prohibition of Justice Department lobbying to alter the antitrust laws, the Department of Justice simply stated that it would not bring any public enforcement actions for violations of the per se illegality of vertical price fixing. *Id.* The only avenue left open to the enforcement of the per se rule was private actions by the injured plaintiffs themselves. *Id.*

103. Vertical Restraints Guidelines Resolution, Pub. L. No. 99-180, § 605, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1169 (1985) (disavowing validity of the Justice Department's Vertical Restraint Guidelines).

104. *Id.* (Congress declares that Justice Department Guidelines are in contravention to Congressional mandate).

ment's guidelines to be a direct contradiction of clear congressional mandates by their (1) "suggesting that certain price fixing conspiracies are legal if . . . limited to restricting intrabrand competition;"[105] (2) "blurring the distinction between price and non-price restraints . . . thereby questioning the accepted rule that vertical price fixing is illegal per se;"[106] (3) "stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to specific prices;' "[107] and (4) "stating that restraints imposed by a manufacturer at the request of dealers are non-price in nature and therefore not subject to the per se rule of illegality."[108] However, the Vertical Restraints Guidelines Resolution was ineffective because the philosophy of the Chicago School had taken root in the judiciary, and grew to fruition in the Supreme Court's *Monsanto* and *Sharp* decisions.[109]

VII. BREAKING WITH THE PAST: THE INFLUENCE OF THE CHICAGO SCHOOL ON THE SUPREME COURT

In *Monsanto Company v. Spray-Rite Service Corporation*,[110] the Supreme Court began to resolve the struggle between Congress and the executive branch over the necessity of a per se prohibition against vertical price fixing.[111] In so doing, the Court in *Monsanto* abandoned the rule that vertical price fixing is inferred when the plaintiff proves that: (1) the manufacturer received communications complaining about the competition from the plaintiff; and (2) the manufacturer terminated its supply based upon this communication.[112] The Court held that a plaintiff must prove "something more"

---

105. *Id.*

106. *Id.*

107. *Id.*

108. Vertical Restraints Guidlines Resolution, Pub. L. No. 99-180, § 605, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1169 (1985).

109. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723-36 (1988) (case altered precedent by adopting Chicago School approach that only agreements which explicitly state price rather than all agreements which affect price are illegal per se); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (Court adopted more stringent burden of proof in vertical price fixing cases).

110. 465 U.S. at 752. In *Monsanto*, a distributor of herbicides brought an antitrust action against the manufacturer alleging that the manufacturer had conspired with other distributors to terminate the plaintiff due to his price-cutting practices. *Id.* at 755-57. The district court as well as the court of appeals held in favor of the plaintiff distributor. *Id.* at 758. The United States Supreme Court affirmed in favor of the plaintiff but readdressed the burden of proof which plaintiffs bear in proving the existence of a price-fixing conspiracy. *Id.* at 768.

111. Report by the House Judiciary Committee on the Price Fixing Prevention Act of 1989, 835 Trade Reg. Rep. (CCH) 9-10 (April 11, 1990).

112. Monsanto v. Spray-Rite Corp., 465 U.S. 752, 760 n.4 (1984). The Court recognized the standard that the plaintiff need only prove that the manufacturer and the competing retailer had communicated in reference to the discounting retailer and that the discounting re-

than mere evidence of complaints in order to establish a conspiracy to fix prices.[113] Instead, the Court asserted that the plaintiff must disprove the existence of any or all hypothetical business reasons that might justify the manufacturer's termination of a dealer.[114] Further, the Court stated that in addition to providing evidence which tends to show the existence of a conspiracy to fix prices, the plaintiff must also prove "that the manufacturer and the non-terminated dealer were acting independently."[115] Thus, *Monsanto* indicated that for a plaintiff to prevail on an action for illegal vertical price fixing, the plaintiff must not only prove a conspiracy to fix prices but also disprove the possible existence of all potential business reasons that might justify the termination of a distributor by the manufacturer.[116] This constitutes a virtually insurmountable double-barrelled burden of proof which is unsupported by precedent or statute.[117]

In response to *Monsanto*, Congress passed House Bill 585 in 1987.[118] However, the Supreme Court decided *Business Electronics Corp. v. Sharp Electronics Corp.*[119] before the bill was passed by the Senate.[120] The *Sharp*

---

tailer was terminated in response thereto. *Id.* However, the Court went on to state that in addition to the enunciated standard, "something more" need be shown in order to prove an agreement exists. *Id.* at 764; *see also* Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, 100 Trade Reg. Rep. (CCH) 1-2 (April 11, 1990) (evidentiary standard prior to and after *Monsanto* decision).

113. *Monsanto*, 465 U.S. at 764. "Something more than evidence of complaints is needed." *Id.*

114. *Id.*; *see also* Report by House Committee on the Judiciary on the Freedom from Vertical Price fixing Act of 1987, 835 Trade Reg. Rep. (CCH) 14 (Nov. 16, 1987) (evidentiary standard has been altered). Now in order to prevail, the plaintiff need prove that:

(1) the manufacturer received communications about the competition of the discount retailer;

(2) the manufacturer terminated its supply to the discount retailer as a result thereof;

(3) no possibility exists that the manufacturer and the competing retailer were acting independently.

Id.

115. Monsanto v. Spray-Rite Corp., 465 U.S. 752, 764 (1984) (Court imposed heightened burden of proof).

116. *Id.*; *see also* Report by House Committee on the Judiciary on the Freedom from Vertical Price fixing Act of 1987, 835 Trade Reg. Rep. (CCH) 4-5 (Nov. 16, 1987) (addition to evidentiary burden placed upon plaintiff).

117. *Monsanto*, 465 U.S. at 764 (plaintiff's burden of proof). Now in order to prevail, the plaintiff must show that the manufacturer received complaints from a full service retailer about the price cutting retailer and that the termination was based upon these communications, as well as exclude all possible legal explanations for the conduct. *Id.* This is unjustified by the case precedent which simply demanded that the plaintiff prove that the manufacturer received complaints about the discount retailer and the discount retailer was terminated as a result thereof. *Id.*

118. 100th Congress, House of Representatives, 35 Cong. Index (CCH) 10 (1987-1988).

119. 485 U.S. 717 (1988).

120. S. 585, 100th Congress, 2d Sess. (1988) (Court adopted Chicago approach before

decision sent shockwaves through Congress and led the House Judiciary Committee to revise and expand its efforts to countermand both the Department of Justice's nonfeasance and the Supreme Court's divergence from precedent in *Sharp* and *Monsanto*.[121]

While *Monsanto* had dramatically altered the burden of proof in vertical price fixing actions, *Sharp* represented a far more sweeping break with the past—it abandoned the per se rule against vertical price fixing. In *Sharp*,[122] a retail dealer complained to its supplying manufacturer regarding losses caused by the competition of a discount retailer in the same geographic location.[123] The retailer contended that the discounter was a "free rider" who unjustly benefitted from the retailer's aggressive market campaign and warranty policies.[124] Shortly after receiving these complaints, the manufacturer terminated the supply of goods sold to the discount retailer.[125] The discount retailer brought an action alleging that the manufacturer's action represented an illegal conspiracy to fix prices and thus violated the Sherman Act.[126] The Supreme Court found that the manufacturer and the retailer had not illegally fixed prices despite the fact that their agreement would have

---

Congress countered *Monsanto*); *see also* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) (case altered precedent by holding that only agreements which explicitly state price are illegal per se rather than all agreements which affect price).

121. *See* Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, 100 Trade Reg. Rep. (CCH) 25 (April 11, 1990) (H.R. 1236 was drafted to replace H.R. 585 which was drafted prior to *Sharp* decision); Report by House Committee on the Judiciary on the Freedom from Vertical Price Fixing Act of 1987, 835 Trade Reg. Rep. (CCH) 4-5 (Nov. 16, 1987) (H.R. 585 was drafted to respond to increased evidentiary burden placed upon plaintiffs by *Monsanto* decision).

122. 485 U.S. 717 (1988).

123. *Id.* at 721. Sharp Electronics published a minimum vertical price schedule which a competing retailer adhered to. *Id.* Business Electronics is a discount retailer who competed in the same geographic marketplace but did not adhere to Sharp's price schedule. *Id.* Sharp Electronics and Business Electronics continued to do business together for several years despite the failure on Business Electronics' part to follow the price schedule. *Id.*

124. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 725 (1988) (full service retailer claimed that Electronics was a "free rider"). Sharp Electronics contended that a manufacturer may terminate a discount retailer who is free riding even at the request of a competing retailer because the manufacturer has an interest to protect product's reputation as well as to the consumer by insuring that the services provided by its retailer conform with the goodwill of the business. *Id.*

125. *See Business Electronics Corp.*, 485 U.S. at 721.

126. *Id.* at 736. The terminated dealer brought an action alleging that the actions between the full service retailer and Sharp Electronics constituted a conspiracy in violation of the per se illegality of vertical price restraints under § 1 of the Sherman Act. *Id.* at 721. The trial court found for the plaintiff and determined that a conspiracy to fix prices had indeed been formed despite the fact that no express agreement to set prices at a specific price level was agreed upon. *Id.* at 719-20.

the ultimate effect of fixing prices.[127]

In effect, the Supreme Court overruled the *Dr. Miles* decision.[128] For over eighty years, *Dr. Miles* and its progeny stated the rule that agreements between manufacturers and retailers which have the effect of fixing a brand's prices are illegal per se.[129] The *Sharp* decision narrowed the scope of the per se illegality under the Sherman Act to encompass only those agreements which explicitly fix prices.[130]

VIII. THE PRICE FIXING PREVENTION ACT OF 1991

In response to *Sharp*, Congress drafted House Resolution 1236 which has since been reintroduced as House Resolution 1470.[131] According to the House Judiciary Committee (the "Committee"), H.R. 1236 and its successor

---

127. 780 F.2d 1212, 1215-18 (1986), *aff'd*, 485 U.S. 717, 720 (1988) (in absence of express or implied agreement to set prices at certain level no illegal vertical restraint exists).

128. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 733-36 (1988) (agreement will not be per se illegal unless there is express agreement as to price level to be affixed). *Contra* Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 399-402 (1911) (agreements which have affect on price are illegal per se).

129. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1977) (per se rule applies to restraints which stifle price competition); National Soc'y of Professional Eng'r v. United States, 435 U.S. 679, 688 (1978) (restraints which have anticompetitive affect on prices are illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (restraints with market impact on price are illegal per se); United States v. General Motors, Inc., 384 U.S. 127, 147 (1966) (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 296 (1945) (price fixing is illegal under Sherman Act even though affects only local prices); United States v. Masonite Corp., 316 U.S. 265, 276 (1942) (fixing prices by one member of group pursuant to express delegation, acquiescence or understanding of others is illegal per se); Fashion Originator's Guild v. FTC, 312 U.S. 457, 466 (1941) (vertical price fixing tends to create monopolies and lessen competition and is illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (vertical price fixing is illegal per se); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 62 (1926) (express or tacit agreement on price is illegal); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 399-403 (1911) (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se).

130. *See Business Electronic Corp.*, 485 U.S. at 723-36 (agreement will not be per se illegal unless there is express agreement as to price level to be affixed).

131. H.R. 1236, 101st Congress, 1st Sess. (1989); H.R. 1470, 102d Congress, 1st Sess. (1991). The Price Fixing Prevention Acts of 1989 and 1991 are identical and provide that:

SECTION 1. SHORT TITLE

This Act may be cited as the "Price Fixing Prevention Act of 1991".

SECTION 2. EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST - ACTIONS RELATING TO PRICE FIXING.

(a) In any civil action based on a claim arising under section 1 or 3 of the Sherman Act (15 U.S.C. 1, 3) and alleging a contract combination, or conspiracy to set, change, or maintain prices (other than a maximum price), evidence that a person who sells a good or service to the claimant for resale-

H.R. 1470 have three purposes.[132] First, the bills announce themselves as Congress's response to ten years of inaction by the Justice Department to prosecute manufacturers who violated the per se rule against vertical price fixing.[133] Second, the bills seek to reestablish the proper evidentiary burden placed upon plaintiffs, which would effectively overturn the Supreme Court's decision in *Monsanto*.[134] Third, and finally, the bills purport to nullify *Sharp*

---

(1) received from a competitor of the claimant a communication regarding price competition by the claimant in the vertical of a good or service, and
(2) in response to such communication terminated the claimant as a buyer of a good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant, shall be sufficient to raise the inference that such person and such competitor engaged in concerted action to set, or maintain prices for such good or service in violation of such section. For purposes of this subsection, a termination or refusal to supply is in response to a communication if such communication is a substantial contributing cause of such termination or refusal to supply. Nothing herein shall preclude the court from entering judgment in favor of the defendant, at trial or prior thereto, if the court determines on the basis of all of the evidence and pleadings submitted by the parties, in accordance with the Federal Rules of Civil Procedure and the requirements of the subsection, that no such inference of concerted action can reasonably be drawn by the trier of fact.
(b) In any civil action based on a claim arising under section 1 or 3 of the Sherman Act (15 U.S.C. 1, 3), and alleging a contract, combination, or conspiracy to set, change, or maintain prices, the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to set, change, or maintain the price (other than a maximum price) of such good or service for vertical shall be sufficient to constitute a violation of such section. An agreement between the seller of a good or service and the purchaser of such good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of such section, whether or not a specific price or price level is agreed upon.
SEC. 3. RULE OF CONSTRUCTION
Nothing in this Act shall be construed to change the requirement of the Sherman Act that a violation of section 1 or 3 of such Act may only be found upon a determination that the defendant entered into an illegal contract, combination, or conspiracy.
SEC. 4. RULE OF REASON STANDARD
(a) IN GENERAL.-Nothing in this Act shall affect the application of the rule-of-reason standard to vertical location clauses or vertical territorial restraints under the antitrust laws.
(b) DEFINITION.-For purposes of subsection (a), the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).
SEC. 5. APPLICABILITY.
Section 2(a) of this Act shall not apply to civil actions commenced before the date of the enactment of this Act.
Id.

132. Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, 438 Trade Reg. Rep. (CCH) 1-2 (April 11, 1990) (H.R. 1236 is Congressional response to acceptance of Chicago School approach to antitrust by Justice Department and by courts).

133. *Id.* The Department of Justice has not filed a public enforcement action for a violation of the per se rule against vertical price fixing in the last ten years. *Id.*

134. *Id.* The bill is designed to negate the additional requirement imposed by the Court

and reestablish the rule that vertical agreements to fix prices are prohibited per se.[135]

The testimony of numerous state attorneys general led the Committee to conclude that commitment to enforce the per se rule existed on the state level.[136] In order to remedy this difference in priorities between state and federal antitrust policies, H.R. 1470 announces the duty of the Justice Department to enforce, at the federal level, the per se illegality of vertical price fixing.[137] H.R. 1470 seeks to remedy more than just the *Monsanto* and *Sharp* decisions; instead, it attempts to definitively prescribe the standards by which the courts should judge all vertical restraints which have the effect of fixing prices.[138]

Section 1 of H.R. 1470 simply states that the bill, if enacted into law, shall be called the "Price Fixing Prevention Act of 1991."[139] The substance of the Act begins in section 2(a) which seeks to restore the evidentiary requirements a plaintiff must satisfy to meet the pre-*Monsanto* standard.[140] As noted above, *Monsanto* requires that in vertical price fixing cases, the plain-

---

in the *Monsanto* decision that the plaintiff needs to disprove all possible legitimate purposes for the agreement in order to prevail. *Id.*; *see also Monsanto*, 465 U.S. at 764 (addition of requirement to negate all possible defenses).

135. Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, 438 Trade Reg. Rep. (CCH) 2 (April 11, 1990) (bill was designed to negate impact of *Sharp*). It is the goal of the framers of H.R. 1236 and 1470 to reestablish that not only agreements which explicitly state price but also those agreements which have an affect on price are illegal per se. *Id.*

136. *Id.* at 30 (April 11, 1990) (committee recalled testimony of state attorneys general).

137. *Id.* at 28-30.

138. *Id.* at 30 (H.R. 1236 and 1470 seek to establish standards by which all vertical restraints are to be judged).

139. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 1 of the Price Fixing Prevention Act of 1991 provides that:

SECTION 1. SHORT TITLE

This Act may be cited as the "Price Fixing Prevention Act of 1991". *Id.*

Likewise, the Senate version is entitled "The Consumer Protection Against Price-Fixing Act of 1991." *See* S. 429, 102d Congress, 154 Sess. (1991).

140. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 2(a) of the Price Fixing Prevention Act of 1991 provides that:

SECTION 2. EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST ACTIONS RELATING TO PRICE FIXING.

(a) In any civil action based on a claim arising under section 1 or 3 of the Sherman Act (15 U.S.C. 1, 3) and alleging a contract combination, or conspiracy to set, change, or maintain prices (other than a maximum price), evidence that a person who sells a good or service to the claimant for resale-

(1) received from a competitor of the claimant a communication regarding price competition by the claimant in the resale of a good or service, and

(2) in response to such communication terminated the claimant as a buyer of a good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant, shall be sufficient to raise the inference that such person

tiff must prove a conspiracy to fix prices, that is, that the manufacturer and retailer did not act independently and the plaintiff must also refute all possible justifications for the alleged conspiracy.[141]

If enacted into law, H.R. 1470 (the "Act") overrules the *Monsanto* decision.[142] According to the Act, the plaintiff will only have to prove, pursuant to section 1 of the Sherman Act, that: (1) a communication was received by the supplier from a rival retailer; and (2) the rival retailer was terminated in response to this communication.[143] The plaintiff will not be precluded from having the issue presented to the jury simply because evidence exists which tends to show that the retailer and manufacturer acted independently or that a reasonable business explanation for the alleged price fixing existed.[144] Of note, section 5 states that section 2(a) will only apply prospectively, that is, from the date of the enactment of H.R. 1470 into law.[145]

---

and such competitor engaged in concerted action to set, or maintain prices for such good or service in violation of such section . . . . *Id.*

Sections 2 and 3 of S. 429 also seek to return the evidentiary burden placed upon plaintiffs in vertical price fixing actions to a pre-*Monsanto* standard. *See* S. 429, 102d Congress, 1st Sess. (1991).

141. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760-64 (1984) (plaintiff need exclude all possibility of independent action). The Court increased the burden placed upon plaintiffs in vertical price fixing actions by stating that "something more" need be shown. *Id.* at 764. In order to prevail, the plaintiff must show that: (1) (a) the manufacturer received complaints from a full service retailer about the price cutting retailer; and (b) that the termination was based upon these communications as well as; (2) exclude all possible legal explanations for the conduct. *Id.*

142. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 2(a) of the Price Fixing Prevention Act of 1991 provides that:

SECTION 2. EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST ACTIONS RELATING TO PRICE FIXING.

(a) . . . evidence that a person who sells a good or service to the claimant for resale-

(1) received from a competitor of the claimant a communication regarding price competition by the claimant in the resale of a good or service, and

(2) in response to such communication terminated the claimant as a buyer of a good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant, shall be sufficient to raise the inference that such person and such competitor engaged in concerted action to set, or maintain prices for such good or service in violation of such section . . . . *Id.*; *see also* S. 429, 102d Congress, 1st Sess. (1991) (evidentiary burden returned to pre-*Monsanto* standard).

143. *Id.*

144. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 2(a) of the Price Fixing Prevention Act of 1991 provides that the plaintiff need not preclude all possible legal explanations in order to recover. *Id.*; *see also* S. 429, 102d congress, 1st Sess. (1991) (Sections 2 and 3 of S. 429 establish evidentiary burdens comparable to H.R. 1470).

145. *Id.* Section 5 of the Price Fixing Prevention Act of 1991 provides that:

SEC. 5 APPLICABILITY.

Section 2(a) of this Act shall not apply to civil actions commenced before the date of the enactment of this Act. *Id.*

Congress partially addressed the *Sharp* decision in section 2(b) of the Act stating that all minimum vertical price fixing is illegal per se under the Sherman Act.[146] However, Congress specifically exempted maximum vertical price fixing from the per se illegality standard imposed by the bill.[147] Congress refused to statutorily implement the *Kiefer-Stewart* decision, which made maximum price restraints illegal, because it viewed the imposition of maximum prices by manufacturers as non-detrimental to the economy since its effect is to hold down prices for the consumer.[148]

---

146. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 2(b) of the Price Fixing Prevention Act of 1991 counteracts the *Sharp* decision by providing that:

> SECTION 2. EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST ACTIONS RELATING TO PRICE FIXING.
>
> (b) . . . the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to set, change, or maintain the price (other than a maximum price) of such good or service for resale shall be sufficient to constitute a violation of such section. An agreement between the seller of a good or service and the purchaser of such good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of such section, whether or not a specific price or price level is agreed upon. *Id.*

147. H.R. 1470, 102d Congress, 1st Sess. (1991); S. 429, 102nd Congress, 1st Sess. (1991). Section 2(b) of H.R 1470 and S. 429 exempt maximum vertical price fixing from the per se standard. *Id.* H.R. 1470 provides that:

> SECTION 2. EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST ACTIONS RELATING TO PRICE FIXING.
>
> (b) . . . the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to set, change, or maintain the price (other than a maximum price) of such good or service for resale shall be sufficient to constitute a violation of such section.

Id. This is contrary to prior caselaw which stated that maximum price restraints were just as inimical as minimum vertical price fixing. *See* Albrecht v. Herald Co., 390 U.S. 145, 151-53 (1968) (termination of dealer for charging in excess of maximum price restraint was illegal per se); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214 (1951) (agreement among competitors setting maximum vertical price illegal per se); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342 (1982) (agreements to fix a minimum or maximum price are illegal per se). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM L. REV. 282, 289-90 (1975) (maximum vertical price restraints are illegal per se).

148. Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, 438 Trade Reg. Rep. (CCH) 30 (April 11, 1990). Congress has stated the proposition that maximum vertical price fixing schemes are not inimical to competition in that they hold down prices and are therefore a benefit to the consumer. *Id.* The Congress fails to recognize that this is contrary to prior caselaw. Furthermore, various commentators state that the imposition of a maximum price restraint simply acts as a price ceiling which will result in shortages because manufacturers will stop production when the true market price is above the price they are allowed to charge. *See Albrecht*, 390 U.S. at 151-53 (maximum price restraints act as artificial stimuli to marketplace and are illegal per se); *Kiefer-Stewart Co.*, 340 U.S. at 214 (agreement among competitors setting maximum vertical price is illegal per se since it stifles competition by reducing output); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332,

Section 3 of H.R. 1470 simply reasserts the holding of the *Colgate* decision.[149] Unilateral action on the part of a manufacturer to implement vertical price restraints is not illegal.[150] This per se legality focuses on the notion that the defendant manufacturer should introduce proof which tends to show that the action of the manufacturer did not impose the vertical restraints at the behest of any retailer, but simply imposed them as a part of a unilateral marketing strategy.[151]

Finally, Section 4 affirms the application of the Rule of Reason standard to all non-price vertical restraints.[152] On June 20, 1990, H.R. 1236, the predecessor of H.R. 1470, was recommended by the House Judiciary Committee for passage by the full House of Representatives, and on April 18, 1990, the House passed the measure.[153] The Senate version of H.R. 1236 was entitled Senate Bill 865.[154] However, the Senate version of H.R. 1236

348-51 (1982) (agreements to fix a minimum or maximum price are illegal per se since both act to interfere with market forces). *See generally* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 289-90 (1975) (maximum vertical price restraints are illegal per se because they act as price ceilings which interfere with market clearing process).

149. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 3 of the Price Fixing Prevention Act of 1991 provides that:

> SEC. 3. RULE OF CONSTRUCTION
>
> Nothing in this Act shall be construed to change the requirement of the Sherman Act that a violation of section 1 or 3 of such Act may only be found upon a determination that the defendant entered into an illegal contract, combination, or conspiracy.

Id.; *see also* United States v. Colgate Co., 250 U.S. 300, 307 (1919) (bilateral not unilateral action which affects price is illegal per se).

150. *See, e.g.*, Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1196-97 (6th Cir. 1982) (unilateral action not in violation of Sherman Act), *cert. denied*, 466 U.S. 931 (1984); Sierra Wine Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132-33 (9th Cir. 1980) (termination of a discount retailer based upon unilateral decision not illegal); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 (8th Cir. 1976) (if refusal to deal unilateral no violation of Sherman Act has occurred but if more than unilateral action such is illegal combination), *cert. denied*, 433 U.S. 914 (1977).

151. *See Colgate Co.*, 250 U.S. at 307 (legality of price oriented vertical restraint depends upon introduction of evidence to demonstrate mere unilateral action).

152. H.R. 1470, 102d Congress, 1st Sess. (1991). Section 4 of the Price Fixing Prevention Act of 1991 provided that:

> SEC. 4. RULE OF REASON STANDARD
>
> (a) IN GENERAL.-Nothing in this Act shall affect the application of the rule-of-reason standard to vertical location clauses or vertical territorial restraints under the antitrust laws.
>
> (b) DEFINITION.-For purposes of subsection (a), the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

Id.

153. *See* 136 Cong. Rec. H. 1518 (April 18, 1990) (H.R. 1236 passes House of Representatives).

154. S. 429, 102d Congress, 1st Sess. (1991). Senate Bill 429 provides that:

was not approved during the 101st, Congress thus prompting both houses of

---

SEC. 1. Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Consumer Protection Against Price-Fixing Act of 1991".

SEC. 2. The Congress Finds that-

(1) consumer welfare is greatly enhanced by an ability to purchase goods and services at lower prices as a result of vigorous price competition;

(2) vertical price restraints generally have an adverse impact on competition that results in higher consumer prices;

(3) recent court decisions have so narrowly construed the laws against vertical price restraints that consumer welfare has been put in jeopardy; and

(4) it is necessary to enact legislation that protects the interests of consumers in vigorous price competition while recognizing the needs of manufacturers and others to maintain reasonable service, quality, and safety standards.

SEC. 3. THE SHERMAN ACT IS AMENDED BY REDESIGNATING SECTION 8 AND ANY REFERENCES TO SECTION 8 AS SECTION 9 AND BY INSERTING BETWEEN SECTION 7 AND SECTION 9, AS HEREIN REDESIGNATED, THE FOLLOWING NEW SECTION:

SEC. 8. (a)(1)(A). In any civil action based on section 1 or 3 of this Act, including an action brought by the United States or by a State attorney general, or by the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if pursuant to the Federal Rules of Civil Procedure the court finds that there is sufficient evidence, direct or circumstantial, from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale entered into a contract, combination, or conspiracy with a competitor of such claimant to curtail or eliminate price competition by such claimant in the resale of such good or service, then the court shall permit the trier of fact to consider whether such person and such competitor is engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section.

(B) For purposes of paragraph (1), the court shall find the existence of 'sufficient evidence' that a person who sells a good or service entered into a contract, combination, or conspiracy if the claimant presents evidence that such person-

(i) received from a competitor of the claimant an express or impled request or demand, including threat to discontinue an existing business arrangement, that the seller takes steps to curtail or eliminate price competition by the claimant in the resale of such good or service, and

(ii) because of such request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to supply to the claimant some or all of such goods or services requested by the claimant: Provided, that a termination or refusal to supply is made because of such request, demand, or threat only if such request, demand or threat is the major contributing cause of such termination or refusal to supply.

(2) The court shall not permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section if the court determines that the trier of fact could only find that such person and such competitor engaged in concerted action by making inferences which are implausible.

(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into

the 102nd Congress to reintroduce H.R. 1236 as H.R. 1470 in the House of Representatives and S. 865 as S. 429 in the Senate.[155] In its most recent action, the Senate Judiciary Committee reported S. 429 to the full Senate without recommendation on March 21, 1991.[156] If approved by both Houses of Congress, a joint committee will harmonize S. 429 and H.R. 1470 and then send the bill on to President Bush for enactment into law.

IX. A *SHARP* SOLUTION

Aside from the academic debate between the Harvard and Chicago Schools over the propriety of the per se illegality of vertical price fixing, the *Monsanto* and *Sharp* decisions represent the more fundamental issue of the separation of powers between the executive, legislative and judicial branches of government. While some overlap of authority is inevitable between the three branches of government, the unprecedented campaign by the Department of Justice to overturn the per se rule of illegality, first enunciated in *Dr. Miles* over eighty years ago, cannot be justified under any authority of the executive branch.[157] The blatant attempt by the Justice Department to supersede the authority of the Legislature contravenes the principle of separa-

---

an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section, except that this section shall not apply when the agreement to set, change, or maintain the resale price of a good or service is an agreement to set, change, or maintain the maximum resale price of a good or service. An agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of this section, whether or not a specific price or price level is agreed upon.

SEC. 4 NOTHING IN THIS ACT SHALL BE CONSTRUED TO CHANGE THE REQUIREMENT OF THE SHERMAN ACT THAT A VIOLATION OF SECTION 1 OR 3 OF THAT ACT MAY NOT BE FOUND UPON A DETERMINATION THAT THE DEFENDANT ENTERED INTO AN ILLEGAL CONTRACT, COMBINATION, OR CONSPIRACY.

SEC. 5 NOTHING IN THIS ACT SHALL AFFECT THE APPLICATION OF THE RULE OF REASON STANDARD TO VERTICAL LOCATION CLAUSES OR VERTICAL TERRITORIAL RESTRAINTS UNDER THE ANTITRUST LAWS. *Id.*

155. *See* 136 CONG. REC. 1409 (Feb. 22, 1990) (S. 865 approved by Senate Judiciary Committee). Senate Bill 865 was reintroduced in the 102d Congress on February 22, 1991 as Senate Bill 429. *See* S. 429, 102d Congress, 1st Sess. (1991). H.R. 1236 was likewise reintroduced in the 102d Congress on March 19, 1991 as H.R. 1470. *See* H.R. 1470, 102d Congress, 1st Sess. (1991).

156. *See* 137 Cong. Rec. D. 357 (March 21, 1991) (S. 429 ordered reported without recommendation by Senate Judiciary Committee).

157. *See* O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (separation of powers to prevent both concentration of power and overlap between branches); Springer v. Philippine Islands, 277 U.S. 189, 201 (1927) (separation of powers basic and essential to American constitutional government).

tion of powers among the three branches of government.[158] Congress ought to temper this struggle by enacting the Vertical Restraints Guideline Resolution which, through the use of the "power of the purse," effectively prevents the Justice Department from urging the courts to abandon the per se illegality of vertical price fixing.[159] This measure, however, has proved fruitless in the past because the theories of the Chicago School had already been embraced by the Supreme Court.[160]

Through the Price Fixing Prevention Act, Congress is seeking to find a simple solution to the *Monsanto-Sharp* dilemma by asserting its supremacy as the "ultimate antitrust policy-maker."[161] As such, Congress intends to

---

158. *See* Report by House Committee on the Judiciary on the Price Fixing Prevention Act of 1989, 438 Trade Reg. Rep. (CCH) 25-29 (April 11, 1990). Section 1 of the Sherman Antitrust Act provides that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1973). This language has been interpreted to mean that all agreements which affect price are illegal per se. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979) (per se rule applies to restraints which stifle competition); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (restraints which have anticompetitive impact on trade illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 (1977) (restraints with market impact on price illegal per se); United States v. General Motors, 384 U.S. 127, 147 (1966) (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and illegal per se); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945) (price fixing illegal under Sherman Act even though affects only local prices); United States v. Masonite Corp., 316 U.S. 265, 276 (1942) (fixing prices pursuant to an express delegation, acquiescence or an understanding is illegal per se); Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941) (vertical price fixing tends to create monopolies and lessen competition and is illegal); United States v. Socony-Vacuum Oil. Co., 310 U.S. 150, 223 (1940) (vertical price fixing is illegal per se); United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1927) (price fixing is illegal per se and no excuses of reasonableness of price will be entertained); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 62 (1927) (express or tacit agreement on price illegal); Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 399-402 (1911) (agreements or combinations between dealers which have purpose of destruction of competition illegal per se). *Contra* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723-36 (1988) (vertical restraints not illegal per se absent express agreement on prices).

159. Vertical Restraints Guidlines Resolution, Pub. L. No. 99-180, § 605, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1169 ("Vertical Restraints Guideline Resolution" forbade use of public funds to urge abandonment of vertical restraints case precedent).

160. Vertical Restraints Guidelines Resolution, Pub. L. No. 99-180, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1169 (disavowing validity of Justice Department's "Vertical Restraint Guidelines").

161. *See* Jefferson County Pharm. Ass'n v. Abbott Labs, 460 U.S. 150, 170 (1983) (*quoting in part* United States v. Cooper Corp., 312 U.S. 600, 606 (1941)) (Congress is ultimate antitrust policy-maker). In commenting on the controversy over the propriety of previous antitrust legislation, the Court stated that: " '[a]lthough Congress is well aware of these criticisms . . . it certainly is not for this Court to indulge in the business of policy-making in the field of antitrust legislation.' Our function ends with the endeavor to ascertain from the words

reorder fundamental antitrust policies such as the evidentiary burden placed upon plaintiffs in vertical price fixing litigation and the standard by which to judge the illegality of vertical price agreements.[162] Such measures should ultimately meet with success since the Supreme Court has historically deferred to the legislative branch on antitrust matters governed by specific statutory authority.[163] The approach of deferring to the stated goals of the written law has been a prominent approach of the Rehnquist Court. Thus, to properly counter the *Monsanto* and *Sharp* decisions and reassert its status as the "ultimate antitrust policy-maker," Congress should quickly and decisively enact the Price Fixing Prevention Act of 1991.

While H.R. 1470(2)(a) clearly reverses the effects of the *Monsanto* decision by reinstating the pre-*Monsanto* evidentiary burden, H.R. 1470(2)(b) does not effectively repair the dichotomy created by the *Sharp* decision between vertical price fixing agreements which affect price but do not directly state price, and those vertical price fixing agreements which explicitly set prices.[164] The pre-*Sharp* standard was clear—agreements which explicitly

---

used, construed in the light of the relevant material, what is in fact the intent of Congress." *Id.* This deference by the judiciary to the legislative branch in the field of antitrust policy has come under attack by the Chicago School. *See generally* Posner, *Statutory Interpretation-in the Classroom and the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983) (Congressional intent subservient to common law). Judge Posner stated that: "[i]f the legislature enacts into statutory law a common law concept, as Congress did when it forbade agreements in 'restraints of trade' in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they interpret a common law principle—in which event the values of the framers may not be controlling at all." *Id.*

162. *Id.*; Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 735-36 (1988) (Court alters absolute rule of per se illegality of agreements which affect price by stating that vertical restraints not illegal per se absent express agreement on prices); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (Court alters evidentiary standard by stating that plaintiff need disprove all justifications which would legitimize agreement).

163. *See* United States v. Cooper Corp., 312 U.S. 600, 606 (1941) (Court acknowledged that it is not antitrust policymaker and stated its duty was only to construe intent of Congress).

164. H.R. 1470, 102d Congress, 1st Sess. (1991). The Price Fixing Prevention Act of 1991 does not include agreements which affect price; it provides that:

> SECTION 2. EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST ACTIONS RELATING TO PRICE FIXING.
>
> (b) . . . a contract, combination, or conspiracy to set, change, or maintain prices . . . shall be sufficient to constitute a violation of such section. An agreement between the seller of a good or service and the purchaser of such good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of such section, whether or not a specific price or price level is agreed upon.

Id. Likewise, the Senate Bill, S. 429, does not effectively counteract the *Sharp* and *Monsanto* decisions because only agreements which directly state price are deemed illegal per se. S. 429, 102d Congress, 1st Sess. (1991). While the pending bill does not expressly state that agreements which do not explicitly state price are illegal per se, prior case precedent makes clear that such agreements are illegal per se. *See* United States v. General Motors Corp., 384 U.S.

or implicitly fixed vertical prices were deemed illegal per se.[165] However, Congress could easily remedy this dichotomy. Congress should rewrite H.R. 1470(2)(b) to state that in addition to vertical agreements which explicitly prescribe price, all agreements by participants in the vertical chain of distribution which directly affect price, are illegal per se. Such language would eliminate the distinction created by the *Sharp* decision and close the loophole which currently exists in the language of H.R. 1470(2)(b).

X. CONCLUSION

To effectively counteract the demise of the per se rule, Congress should implement a fourfold program. First, Congress should continue to impose the Vertical Restraints Guideline Resolution to prevent the Justice Department from seeking the help of the judiciary to overrule further antitrust case precedent. Second, the language of H.R. 1470(2)(a) needs to be adopted into law in order to reverse the effects of the *Monsanto* decision and reaffirm that a plaintiff in vertical price fixing litigation need only show that the manufacturer received complaints from a competing retailer and that the plaintiff was terminated as a result. Third, Congress must delete the provision in H.R. 1470 which exempts maximum price fixing agreements from the scope of the per se illegality and thus leave the *Kiefer-Stewart* decision intact. Finally, Congress must amend the language of H.R. 1470(2)(b) to reflect the rule that vertical price fixing, whether it explicitly states price or has the effect of fixing a price, is illegal per se under the Sherman Antitrust Act as an illegal contract, combination, or conspiracy in restraint of trade. Only if all of these measures are enacted into law can Congress reestablish its role as the "ultimate antitrust policymaker."

127, 147 (1966) (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 296 (1945) (price fixing illegal under Sherman Act even if it only affect prices but does not explicitly state them).

165. *See* National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (restraints which have anticompetitive impact on trade are illegal per se); *see also* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979) (per se rule applies to restraints which stifle competition); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51 51 (1977) (restraints with market impact on price are illegal per se); United States v. General Motors, 384 U.S. 127, 147 (1966) (attempts to eliminate discount retailers in order to protect franchise dealers has indirect affect on price and is illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) rehearing denied 310 U.S. 658 (1940) (vertical price fixing illegal per se); United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1926) (vertical price fixing illegal per se and reasonableness of price is no excuse); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 62 (1926) (express or tacit agreement on price is illegal); Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 399-402 (1911) (agreements or combinations between dealers which have purpose of destruction of competition are illegal per se).